USTELECOM
UNITED STATES TELECOM ASSOCIATION

**NOTICE OF *EX PARTE* PRESENTATION**

December 21, 2005

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

Re: Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286

Dear Ms. Dortch:

On December 21, 2005, James Olson and I, on behalf of the United States Telecom Association (USTelecom), and Jeffrey Linder with Wiley Rein & Fielding, LLP, on behalf of Verizon, met with Thomas Navin, Bureau Chief of the Wireline Competition Bureau, and Jeremy Marcus and Ian Dillner, both Legal Counsel to the Bureau Chief, regarding the above-referenced proceeding. We proposed that the Commission should adopt a Notice of Proposed Rulemaking, addressing jurisdictional separations reform, and should at the same time adopt a contingent, interim extension of the current separations freeze, consistent with and as more fully set forth in the attached white paper.

In accordance with section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please feel free to contact me if you have any questions.

Sincerely,

Robin E. Tuttle

Robin E. Tuttle
Counsel

Attachment

cc: Thomas Navin
Jeremy Marcus
Ian Dillner

# UNITED STATES TELECOM ASSOCIATION

# WHITE PAPER

# PAVING THE WAY FOR JURISDICTIONAL SEPARATIONS REFORM

**December 12, 2005**

United States Telecom Association

By: James W. Olson
Indra Sehdev Chalk
Jeffrey S. Lanning
Robin E. Tuttle

Its Attorneys

# PAVING THE WAY FOR JURISDICTIONAL SEPARATIONS REFORM

Five years ago, the Commission elected to freeze jurisdictional separations pending comprehensive reform of the separations rules. Not surprisingly, given continued dramatic changes in technology and the competitive environment, such reform has yet to occur. Yet the June 30, 2006 expiration date for the freeze is fast approaching, causing significant uncertainty in the industry and forcing carriers to consider making substantial investments in an effort to permit compliance with separations study requirements if the freeze is not extended.

The Commission should resolve this situation in two ways. First, it should adopt a Notice of Proposed Rulemaking to address how to proceed in order to take final action on the freeze as soon as possible. Second, to mitigate the existing uncertainty and disruption and to forestall even greater disruption if – despite its best efforts – the Commission is not able to implement a new rule before July 1, 2006, the Commission should adopt at this time a contingent, temporary extension of the freeze to preserve the status quo from July 1, 2006 until a permanent rule retaining, modifying, or terminating the freeze takes effect. This interim action is particularly warranted because the Commission is likely to decide to extend the freeze, causing any resources committed to prepare for expiration of the freeze to have been wasted. The NPRM also should reaffirm that price cap carriers do not have to conduct resource-intensive investment studies during the pendency of the freeze. This course of action will advance the public interest and is well within the Commission's authority under the Administrative Procedure Act ("APA") and the Communications Act.

## I. THERE IS AN IMMEDIATE NEED FOR COMMISSION ACTION EXTENDING THE FREEZE ON AN INTERIM BASIS.

There is an urgent need for the Commission to extend the freeze on an interim basis pending implementation of a new regulatory regime for separations. With only six months to go until the freeze is set to expire, carriers already are in the untenable position of having to either make considerable investments in an effort to resuscitate their ability to perform separations studies, or sit tight and hope that the Commission ultimately will decide to retain the freeze.

The effort needed to prepare for expiration of the freeze is both substantial and time-consuming. Without regulatory certainty, companies could be forced to revamp their systems to track usage and generate detailed records on a temporary basis while the Commission and Joint Board continue to evaluate comprehensive reform of the separations rules. Doing so would impose a heavy and unnecessary burden on carriers. For example, under the separations system that existed before the freeze, more than 475 separate studies had to be performed. One carrier alone reported that "at least 60 employees and 11 major computer systems are devoted to maintaining the separations data bases and performing separations calculations."[1]

[1] Comments of Verizon on Joint Board Recommended Decision, CC Dkt No. 80-286, at 2 (Sept. 25, 2000); s*ee also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶¶ 131, 134 (2005) ("*Wireline Broadband Order*") (declining to classify broadband Internet access transmission as a nonregulated activity under part 64 because doing so would require the development of "resource-intensive" new mechanisms that would "impose significant burdens" on

More specifically, the costs associated with once again performing facility studies would include additional manpower, program updates, and updates to the provisioning databases to ensure the necessary fields are populated to retrieve separations-type information. The programs that were used to prepare facilities results have not been maintained since the inception of the separations freeze and would need to be validated in order determine whether they are even workable at this point. Feeder system field updates and hardware/software system updates could dictate reprogramming of the facility study programs. The people who maintained those programs prior to the freeze are no longer in place, and new staff would have to be hired and trained. Likewise, the expertise to perform full traffic and facility studies no longer exists, and carriers would have to start from close to scratch to revive these study groups. Separations personnel also were involved in analyzing, trending, and validating feeder system data (*i.e.*, provisioning data, location assets, and the like) to ensure accuracy of results. There were daily tasks associated with some of these validations, which have not taken place in almost five years. In fact, the separations-related fields that were maintained in the provisioning databases could be in total disrepair, because those fields are not required for normal provisioning of customers.

An interim extension of the freeze is particularly urgent and warranted because the public policy reasons motivating the Commission to adopt the freeze in 2001 are even more pressing today, rendering it extremely likely that the Commission ultimately will decide to retain the freeze:

*First*, the Commission adopted the separations freeze to "reduce regulatory burdens on carriers during the transition from a regulated monopoly to a deregulated, competitive environment in the local telecommunications marketplace."[2] That "transition" is virtually complete in most parts of the country, undermining any need for burdensome separations rules. Not only has there been an extensive increase in competition from intramodal providers,[3] but competition from wireless and other intermodal providers (including VoIP) has increased exponentially. Analysts report that "VoIP subscriber growth is skyrocketing" and are predicting "triple-digit growth from 2005 to 2006, with 6 million new subscribers a year every year from 2006 to 2008, when there will be over 24 million [VoIP subscribers]."[4] Similarly, Deutsche

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ILECs without any countervailing benefits); *id.* ¶ 135 ("Because the costs of requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission operations as nonregulated activities under part 64 exceed the potential benefits, we decline to require such a classification.").

[2] *See Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 16 FCC Rcd. 11382, ¶ 13 (2001) ("*Separations Order*").

[3] As of June 2000, there were less than 12 million CLEC lines, with a 4.3 percent market share. By December 2004, CLECs had nearly 32 million lines, with an 18.5 percent market share. *See* FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of December 31, 2004*, at 1 & Table 1 (2005).

[4] *3 Providers Dominate VoIP Subscriber Share; 24M Subscribers Expected by 2008*, VoIPNews, Oct. 26, 2005, http://www.voip-news.com/art/10g.html (quoting Kevin Mitchell, Principle Analyst of Infonetics Research); *see also* Marguerite Reardon, *VoIP Providers Band Together*, CNET News.com, Nov. 2, 2005, http://news.com.com/VoIP+providers+band+together/2100-7352_3-5929200.html ("About 3 million people use voice over IP today . . . [b]ut that number is expected to increase to 27 million by the end of 2009.").

Bank reported that it expects that "access line losses will escalate over the next 12 months towards 6%, and possibly as high as 8% per annum, driven by wireless cannibalization, rapid take-off of cable telephony, and proliferation of non-facilities-based VoIP services."[5] Each of the three sources of competition noted by Deutsche Bank – wireless, cable telephony, and non-facilities-based VoIP – is far more extensive today than at the time the freeze was adopted.[6]

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[5] Viktor Shvets & Andrew Kieley, Deutsche Bank, *Consumer Wireline Erosion: The Strategic Response to "Water Torture"* at 2 (May 19, 2005).

[6] Wireless. At the end of 2000, there were fewer than 110 million wireless subscribers, a figure which grew to more than 194 million wireless subscribers as of October 2005. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Tenth Report, 20 FCC Rcd. 15908, App. A, Table 1 (2005); CTIA Wireless Quick Facts (Oct. 2005), *available at* http://files.ctia.org/pdf/Wireless_Quick_Facts_October_05.pdf. During the last few years, the percentage of wireless users that have given up wireline service has grown to 7-8 percent, which is up from approximately 2 percent in 2001. *See* B. Bath, Lehman Brothers, *Final UNE-P Rules Positive for RBOCs*, at Figure 2 (Dec. 10, 2004). Indeed, one analyst puts the number even higher: "Between 10% and 15% of the total market is now using wireless exclusively." Jack Dierdorff, *Dialing into Wireless Stocks; As Wireless Builds Momentum Against Wireline, S&P's Kenneth Leon Points to the Best Companies in Service and Equipment*, Business Week Online, Mar. 7, 2005, http://www.businessweek.com/bwdaily/dnflash/mar2005/nf2005037_6375_db006.htm. Moreover, at least 14 percent of U.S. consumers now use their wireless phone as their primary phone. *See* C. Wheelock, In-Stat/MDR, *Cutting the Cord: Consumer Profiles and Carrier Strategies for Wireless Substitution* at 1 (Feb. 2004). As a result, analysts estimate that, by 2009, between 23 and 37 percent of wireless subscribers will use a cell phone as their primary telephone. *See* Dinesh C. Sharma, *Consumers Ready to Ditch Landlines*, CNET News.com, Oct. 25, 2005, http://news.com.com/Consumers+ready+to+ditch+landlines/2100-1039_3-5913185.html. Even more telling, wireless usage has captured billions of local and interstate access minutes from wireline networks. One analyst has concluded that 60 percent of long-distance calls in households with cellular phones are now made on wireless phones. *See* Philip Marshall, *et al.*, The Yankee Group, *Divergent Approach to Fixed/Mobile Convergence* at 7 (Nov. 2004).

Cable telephony. As of year-end 2004, cable companies were offering voice telephone service to more than 32 percent of U.S. households, and they plan to offer voice telephone service to nearly 60 percent by the end of this year, and to more than 80 percent by the end of 2006. *See Bernstein 1Q05 Review* at 4, Exhibit 2; J. Halpern, *et al.*, *Quarterly VoIP Monitor: How High Is Up for Cable VoIP?* at 4, Exhibit 2 (Mar. 24, 2005). Cable companies report that they have attracted 20-40 percent of all subscribers in some markets where they offer telephone service. *See* News Release, Cox Communications, Cox Brings Telephone to Five New Markets in '05 (Mar. 8, 2005) (*available at* http://phx.corporate-ir.net/phoenix.zhtml?c=76341&p=irol-newsArticle&t=Regular&id=683077&). Cable companies also are expanding aggressively into the business market. *See, e.g.*, Cox Communications, *Business Services*, http://www.cox.com/business/; Cablevision Lightpath, *Our Network Built for Business*, http://www.lightpath.net/; Comcast, *Business Overview*, http://www.work.comcast.net/.

Non-facilities-based VoIP. In addition to VoIP services that consumers can obtain from cable companies, any person with broadband access can obtain voice services from an independent VoIP provider. Vonage already has more than 1 million active VoIP lines. *See* Press Release, Vonage, Vonage Contracts With Verizon For Nomadic VoIP E9-1-1 Service (May 4, 2005) (*available at* http://www.vonage.com/corporate/press_index.php?PR=2005_05_04_0); Jeffrey Citron, Chairman and CEO, *From the CEO*, Vonage Digital Newsletter, Sept. 27, 2005, http://www.vonage.com/newsletters.php?lid=footer_newsletters. And Skype's free computer-to-computer offering has carried more than 7 billion minutes of talk time. *See SkypeIn and Skype Voicemail Beta*, TMCnet, Apr. 15, 2005, http://www.tmcnet.com/usubmit/2005/Apr/1134642.htm; *see also* Arshad Mohammed, *Internet Phone Subscriptions Up By A Third in 3 Months*, Wash. Post, Nov. 15, 2004, at D4.

*Second*, the Commission found in 2001 that new technologies, such as DSL and growth of packet switching services, rendered its Part 36 rules unworkable.[7] In particular, the Commission noted that the increase in use of these technologies "may call into question the continued validity of usage-based separations procedures designed for circuit-switched technologies and services."[8]

As the Commission is well aware, DSL and packet switching deployment have exploded over the past four years, rendering the historical separations rules even more "unworkable." In 2001, there were only 1 million DSL lines;[9] by year-end 2004, that number had increased to nearly 14 million.[10] Likewise, deployment of packet switching has increased substantially.[11] Not only did the number of CLEC packet switches increase 690 percent between 1999 and 2004,[12] but ILECs are rapidly converting to packet-switching technology as well. For example, Verizon began installing packet switches in parts of the company's inter-city network in 2002,[13] and has announced expanded packet-switched investment in its local networks.[14] The explosive

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[7] *Separations Order*, ¶¶ 1, 12.

[8] *Separations Order*, ¶ 12 n.32.

[9] *See* FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of December 31, 2004*, at 2 & Table 1 (2005).

[10] *See id.*

[11] *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, ¶ 99 (2005).

[12] *See id.* ¶ 206 n.545 (noting that the number of competitive packetized switches increased from 1,260 in 1999, to 8,700 in 2004 (citing BellSouth, SBC, Qwest, and Verizon, UNE Fact Report 2004, *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Dkt No. 01-338; WC Dkt No. 04-313, at I-2, Table 1 (Oct. 4, 2004))). As further evidence of such competition, the Commission not only determined that competitive carriers are not "impaired" under Section 251(c) of the Act without unbundled access to packet switching, but the Commission also forbore from enforcing the requirements of Section 271 for such broadband elements. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd. 16978 (2003) (Triennial Review Order), corrected by Errata, 18 FCC Rcd. 19020 (2003) (Triennial Review Order Errata), *vacated and remanded in part, aff'd in part*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S. Ct. 345 (2004); *see also Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 USC §160(c*), Memorandum Opinion and Order, 19 FCC Rcd. 21496 (2004).

[13] *See* News Release, Verizon, Verizon Begins Deploying Packet Switches to Provide Local Phone Service (June 22, 2004) (*available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85654).

[14] *See* News Release, Verizon, Verizon Outlines Leadership Strategy for Broadband Era; Announces Major New 3G Mobile Data and Wireline IP Network Expansions (Jan. 8, 2004) (*available at* http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=83234); *CPUC Reversal Allows Verizon to Invest in New Technologies, Better Services for Californians*, PR Newswire, Sept. 22, 2005,

adoption of VoIP technologies further complicates separations analyses because VoIP users can be physically located in one state and have a telephone number associated with a different state.[15] For these reasons, an interim extension of the freeze is both critically important and fully consistent with the policy reasons underlying the *Separations Order*.

## II. THE COMMISSION SHOULD INITIATE AN NPRM TO SOLICIT COMMENTS REGARDING STEPS NECESSARY FOR COMPREHENSIVE SEPARATIONS REFORM.

In adopting the separations freeze, the Commission emphasized that it was taking a first step towards "reforming outdated regulatory mechanisms that are out of step with today's rapidly-evolving telecommunications marketplace."[16] The *Separations Order* itself left the subsequent steps unspecified, stating only that, "prior to the expiration of the five-year period, the Commission shall, in consultation with the Joint Board, determine whether the freeze period shall be extended. The determination of whether the freeze should be extended at the end of the five-year period shall be based upon whether, and to what extent, comprehensive reform of separations has been undertaken by that time."[17]

Shortly after release of the *Separations Order*, the State members of the Separations Joint Board issued a "Glide Path" paper proposing various options for post-freeze separations policy (including the possibility of extending the freeze beyond 2006). The Commission sought comment on the Joint Board's proposal, but neither the Commission nor the Joint Board took further action.[18] Then, in February 2002, the Joint Board held an en banc hearing on the Glide Path paper. Two years later, in mid-2004, the State members of the Separations Joint Board sent a letter to the Federal members suggesting that the Joint Board issue a notice requesting comments and information regarding separations reform, to be followed by a Recommended Decision no later than July 2005.[19] No action was taken in response to this letter, although in March 2005, the FCC proposed an information collection "to enable the Federal-State Joint Board on Separations and the Commission to determine whether to extend the separations freeze,

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http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/09-22-2005/0004113756&EDATE=.

[15] The Commission has recognized that VoIP services cannot be separated into intrastate and interstate components and that VoIP is a jurisdictionally mixed service. *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶ 14 (2004).

[16] *Separations Order*, ¶ 1.

[17] *Id*. ¶ 29.

[18] *See* Common Carrier Bureau Seeks Comment on 'Glide Path' Policy Paper Filed by State Members of the Federal-State Joint Board on Jurisdictional Separations, CC Dkt No. 80-286, *Public Notice*, DA 01-2973 (Dec. 20, 2001).

[19] Letter from Paul Kjellander, Diane Munns, Judith Ripley, and John Burke to Michael K. Powell, Michael J. Copps, and Kevin J. Martin (May 27, 2004) (CC Dkt No. 80-286).

and, if not, whether and how to modify the jurisdictional separations process."[20] In addition, the Commission has noted on several occasions that the issue of comprehensive separations reform remains pending before the Joint Board.[21]

At this point, therefore, it is not clear whether a new referral to the Joint Board is necessary to comply with Section 410(c) of the Act. Nor is it apparent what notice and comment, if any, may be needed to comply with the APA. Accordingly, the Commission should issue a Notice of Proposed Rulemaking soliciting comment on (1) the procedures the Commission should employ with respect to extending, modifying, or replacing the freeze on a permanent basis, and (2) the substantive action that ultimately should be taken.

In particular, questions for public comment should include:

- Whether the Commission needs to make a specific referral to the Joint Board regarding the ultimate extension, modification, or elimination of the freeze;
- How any procedures recommended by commenters would affect the Commission's ability to act before June 30, 2006; and,
- Whether the separations freeze should be extended and, if so, for how long.

Seeking concurrent comment on the procedural and substantive issues will enable the Commission (and the Joint Board, if necessary) to move expeditiously once appropriate procedures have been established.

## III. THE COMMISSION HAS AUTHORITY TO EXTEND THE FREEZE ON AN INTERIM BASIS IN ORDER TO MINIMIZE REGULATORY UNCERTAINTY AND MARKETPLACE DISRUPTION.

The Commission has authority to extend the freeze on an interim basis, pending a decision about the long-term future of the separations freeze and comprehensive separations reform. Such interim action to preserve the status quo pending completion of the broader rulemaking proceeding would receive substantial deference, and the interim nature of the extension combined with the urgent need for prompt action support the Commission's ability to proceed without additional notice and comment. Finally, although the Commission should take comment on whether a referral to the Joint Board is necessary in order to reach a permanent decision on the freeze issue, no referral to the Joint Board is necessary with respect to the interim freeze suggested here because the Board already is aware of the possibility of an extension and any required referral can be accomplished through the NPRM.

[20] Public Information Collection(s), 70 Fed. Reg. 11,971, 11,972 (Mar. 10, 2005).

[21] *See, e.g., Wireline Broadband Order*, ¶ 144.

### A. The Commission Has Discretion To Extend The Freeze On An Interim Basis.

The Commission enjoys considerable discretion to adopt interim rules pending longer-term changes to its regulations. This is particularly so where the interim rules merely "maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated."[22] Indeed, the D.C. Circuit has upheld interim rules that the Commission adopted to afford itself sufficient time to "implement comprehensive separations revisions in a manner that would cause the least upheaval in the industry."[23] Here, the interim extension of the freeze would accomplish precisely that: the industry would continue to operate under rules that have been in place for almost five years, pending consideration of the best means of proceeding with separations reform. In contrast, failing to extend the freeze pending final action on the NPRM would impose significant and ultimately unnecessary costs on the industry and would jeopardize the Commission's ability to accomplish its stated objectives of reducing administrative burdens and eliminating obstacles to the deployment of new services and technologies. *See* Section I above.

As the D.C. Circuit has explained, "[a]voidance of [such] market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule."[24] Because the Commission has yet to "comprehensively reform Part 36" and the industry faces substantial uncertainty pending completion of such reform, an interim extension of the freeze is both appropriate and necessary.

### B. The Commission Need Not Seek Additional Comment Before Adopting the Interim Freeze.

As described in detail in Section I, the uncertainty created by the June 30, 2006 deadline is forcing the industry to decide in the very near future whether to make the considerable resource commitments that would be necessary to resurrect a regime of separations studies. Even an expedited comment cycle on the need for an interim extension of the freeze is likely to result in a delay of at least two to three months before the Commission can act, putting carriers in the untenable position of having to predict Commission action in order to decide whether they need to commit funds *before* the deadline in order to anticipate a reversion to the old rules. Moreover, in response to the Commission's deregulatory initiatives and in furtherance of the critical objectives underlying Section 706 of the 1996 Act, many carriers are investing heavily in fiber optic lines, packet switching, and other new technologies. Under the freeze, carriers enjoy a stable environment and thus can make decisions regarding new investments without having to factor in possible changes in arbitrary cost allocation rules that might render those investments inefficient or even economically irrational. Finally, the interim extension of the freeze is likely

[22] *MCI Telecoms. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984); *see also CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

[23] *MCI Telecoms. Corp.*, 750 F.2d at 141.

[24] *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing *MCI Telecoms. Corp.*, 750 F.2d at 141; *ACS of Anchorage v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)).

to be of limited duration, since the accompanying NPRM would establish a procedural schedule for resolving the issues surrounding disposition of the freeze.

Under the APA, an administrative agency may implement a rule without public notice and opportunity for comment "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[25] Given the circumstances presented here – the looming expiration of the freeze, the need to make substantial investments in order to prepare for the possibility that the freeze might expire, the likelihood that the Commission ultimately will extend the freeze, and the issuance of an NPRM affording the opportunity to comment on both the process and substance of comprehensive separations reform – the Commission is entitled to invoke this exception to the general notice and comment requirements.[26]

Indeed, the instant situation falls squarely within D.C. Circuit precedent upholding an agency's ability to dispense with notice and comment under appropriate circumstances. In *Mid-Tex Electric Cooperative, Inc. v. FERC*, for example, the court upheld FERC's adoption of interim rules regarding the inclusion of certain investments in a utility's rate base without notice and comment, even where the interim rules were very similar to permanent rules that the court previously had vacated. In so holding, the court explained that "a rule's temporally limited scope is among the key considerations in evaluating an agency's 'good cause' claim" under § 553(b)(3)(B), particularly when the agency has persuaded that court that "it is not engaging in dilatory tactics during the interim period."[27] As in *Mid-Tex*, an interim extension of the separations freeze would be "temporally limited," and the accompanying NPRM would establish a firm schedule for replacement of the interim freeze with a final rule.

The *Mid-Tex* court also found significant FERC's explanation that the vacated rule (which the interim rule largely replicated) had been supported by a "'broad and substantial record,'" that utilities had placed "'considerable reliance'" upon the vacated rule while it had been in effect, and that the interim rule would guard against "'regulatory confusion' and 'irremedial financial consequences.'"[28] So too, here. The current separations freeze resulted

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[25] 5 U.S.C. § 553(b)(3)(B).

[26] The Commission's discretion here is bolstered by the fact that it sought comment in 2002 on the Joint Board's Glide Path paper, which included extension of the freeze as an option, and that it issued a notice of information collection in March 2005 asking for data that could be used to determine whether to extend the freeze. Accordingly, the Commission arguably has satisfied any notice and comment requirements that might pertain if the APA's exception were found to be inapplicable.

[27] *Mid-Tex Elec. Coop. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987).

[28] *Id.* at 1131-133 (quoting Order Denying Requests for Rehearing, 51 Fed. Reg. 22,065 (June 18, 1986)); *see also Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd. 16783, ¶¶ 27-28 (2004) ("Courts have upheld agencies' exercise of section 553(b) authority based on considerations such as the need to avoid 'regulatory confusion' and industry disruption . . . ."); Bell Operating Companies, Joint Petition for Waiver of Computer II Rules, Order, 10 FCC Rcd. 13758, ¶ 27 (1995).

from a consensus recommendation by the Joint Board and was broadly backed by all affected parties. Moreover, carriers have relied heavily on the freeze's remaining in effect, both by discontinuing the burdensome resource commitments underlying the old regulatory structure and, more importantly, by ramping up investment in next-generation networks in response to the Commission's taking action to "bring simplification and regulatory certainty to the separations process in a time of rapid market and technology changes until reform is completed."[29]

Finally, the risk of "regulatory confusion" and "irremedial financial consequences" is both real and growing, as explained in Section I above. Since 2001, the lines between interstate and intrastate services have become even more "blurred," and the Commission is still considering the appropriate regulatory treatment of many of those services.[30] With the dramatic increase in IP-enabled services and intermodal competition, the need for "simplification and regulatory certainty" is greater than ever. Accordingly, good cause exists for extending the freeze on an interim basis without additional notice and comment, particularly because doing so would "merely maintain [the] obligations that have been governing the industry."[31]

### C. The Commission May Extend The Freeze On An Interim Basis in the NPRM Without An Additional Referral To The Joint Board Under Section 410(c).

For two reasons, the Commission may extend the freeze on an interim basis without referring the matter to the Joint Board pursuant to Section 410(c). First, Section 410(c) is inapplicable to such an interim extension by the terms of the statute, which require referral only of a "proceeding regarding . . . jurisdictional separation . . . which [the Commission] institutes pursuant to a notice of proposed rulemaking."[32] As explained above in Section III.B, the Commission may and should adopt the interim extension without a notice of proposed rulemaking.

Second, and more broadly, the Commission already has satisfied the procedural requirements of Section 410(c) with respect to action on the separations freeze. The Notice of Proposed Rulemaking that ultimately resulted in the *Separations Order* sought comment on the

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[29] *Separations Order*, ¶ 2.

[30] The Commission recently instituted a further notice of proposed rulemaking to determine whether it should impose certain Title II regulations on broadband providers. *See Wireline Broadband Order*, ¶¶ 77-83; *see also Petition of SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd. 9361, ¶ 4 (2005) ("[T]he Commission has not yet decided the extent to which IP-enabled services are covered by Title II and its implementing rules."); *Vonage Holdings Corporation Petition for Declaratory Ruling*, ¶ 44 ("We emphasize that while we have decided the jurisdictional question for Vonage's DigitalVoice here, we have yet to determine final rules for the variety of issues discussed in the *IP-Enabled Services Proceeding*. While we intend to address the 911 issue as soon as possible, perhaps even separately, we anticipate addressing other critical issues such as universal service, intercarrier compensation, section 251 rights and obligations, numbering, disability access, and consumer protection in that proceeding.").

[31] *Unbundled Access to Network Elements*, *supra* note 28, ¶ 28.

[32] 47 U.S.C. § 410(c).

full range of separations issues engendered by recent legislative, technological, and market changes and specifically invited the State members of the Joint Board to "develop a report that would identify additional issues that should be addressed by the Commission in its comprehensive separations reform effort."[33] In response, the Joint Board issued a Recommended Decision suggesting "that the Commission institute the Part 36 factors and categories freeze for a five-year period *or until the Commission takes further action in this docket*."[34] Thus, the Commission already expressly sought the Joint Board's input regarding a freeze, the Joint Board recommended adoption of an interim (though potentially open-ended) freeze, and the Commission, consistent with the Joint Board's recommendation, could have opted for an even longer freeze than it adopted. Accordingly, the Commission can extend the freeze on an interim and contingent basis now without first issuing a further referral to the Joint Board.[35]

In any event, the NPRM will solicit comments on the key underlying issue of whether the freeze should be extended, modified, or replaced on a permanent basis, and the Joint Board will have full opportunity to provide its advice and counsel. Consequently, the NPRM would respect the Joint Board's expectation that any decision to extend the five-year freeze occur after securing its "recommendation."

## IV. THE COMMISSION SHOULD CONFIRM THAT INVESTMENT STUDIES ARE NOT REQUIRED.

Along with soliciting comments and extending the freeze on an interim basis, the NPRM should reiterate that price cap LECs need not perform investment studies to enable "direct assignment" of particular investment categories, subcategories, and subclassifications to the interstate jurisdiction.[36] There is a pressing need for this action: notwithstanding the

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[33] *Separations Order*, ¶ 5 (citing *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, 12 FCC Rcd. 22120, ¶¶ 9-19 (1997)).

[34] *Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Recommended Decision, 15 FCC Rcd. 13160, ¶ 26 (2000) (emphasis added) ("*Joint Board Recommended Decision*"). The *Separations Order* likewise noted that the "Joint Board recommended that, for five years or until such time as comprehensive reform of separations can be implemented, the Commission should institute an interim freeze of the Part 36 category relationships and jurisdictional allocation factors." *Separations Order*, ¶ 10.

[35] *See Tex. Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 416-17 (5th Cir. 1999) (if the Joint Board "had already considered the jurisdictional effects" of the FCC's decision in the Commission's initial referral to the Joint Board under Section 410(c), such action "fulfills § 410(c)'s consultation requirement"). The court also stated that the Commission satisfies Section 410(c)'s referral requirement even if its decision differs slightly from the issues referred to the Joint Board, because the Joint Board need only be "aware of" the effects of the jurisdictional separations rules. *Id.* Here, there can be no question that the Joint Board was "aware of" the separations freeze and the possibility that the freeze could be extended beyond five years.

[36] This ruling, like the contingent extension of the freeze, is in substance an interim action, because the issue of whether studies should be required may be reexamined in the proceeding initiated through the NPRM. Referral of this matter to the Joint Board is not required because the requested confirmation is merely an interpretation of the Commission's own *Separations Order*; for the same reason, additional notice and comment is not required under the APA. *See* 5 U.S.C. § 553(b)(3)(A) (excluding "interpretative rules" and "general statements of policy" from notice and comment requirements).

Commission's decision to freeze category relationships and jurisdictional cost allocation factors, certain state commissions have taken the position that carriers must reallocate major portions of their network investment to the interstate private line category.[37] As a practical matter, such a mandate would compel a carrier to conduct investment studies in order to determine whether particular types of investment are used exclusively for providing interstate services. Any such requirement is inconsistent with the *Separations Order*, past guidance from Commission staff, and the Joint Board's understanding of the effects of the freeze.

Under the *Separations Order*, LECs are not required to conduct investment studies, which as noted above are necessary prerequisites to direct assignment. That *Order* specified that price cap carriers "will not have to perform the analyses necessary to categorize annual investment changes for interstate purposes" and held that, "[b]ecause a goal of the freeze is to reduce administrative burdens on carriers . . . any Part 36 requirement to segregate costs recorded in Part 32 accounts into categories, subcategories, or further sub-classifications shall be frozen at their percentage relationship for the calendar year 2000."[38] While the Commission also stated that categories or portions of categories that had been directly assigned prior to the freeze should continue to be directly assigned, this exception to the freeze is narrow and does not require investment studies: "portions of facilities that are utilized *exclusively* for services within the state or interstate jurisdiction are readily identifiable, [so] the continuation of direct assignment of costs [for those categories] will not be a burden."[39] Conversely, if plant is used for both interstate and intrastate purposes, the categories, sub-categories, and subclassifications containing that plant, and the allocation of those categories, subcategories, and subclassifications, remains frozen at their 2000 levels.

Following release of the *Separations Order*, on June 28, 2001, RBOC representatives met jointly with Commission staff to clarify the relationship between paragraphs 22 and 23 of that *Order*. At the meeting, the RBOC representatives explained that the only way to update direct assignments without conducting an investment study was if the directly assigned amounts were based on amounts that were readily identifiable from the company's general ledger. In response, the staff confirmed that investment studies were no longer required and that direct assignment applied only to categories and portions of categories that had been directly assigned prior to the freeze and were readily identifiable without the use of studies.

Finally, the Joint Board's *Recommended Decision* regarding the freeze provides still further affirmation that investment studies are not required. As the Joint Board explained, the freeze means that "carriers will not have to perform the analyses necessary to categorize annual investment changes for interstate purposes. The major divisions of separations, such as central

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[37] *See Investigation into a Successor Incentive Regulation Plan for Verizon New England, Inc., d/b/a Verizon Vermont*, Dkt No. 6959, *Order* (Vt. Pub. Serv. Bd. Sept. 26, 2005). Similar arguments have been presented in an ongoing docket of the Maine Public Utilities Commission. *See* Direct Testimony of Robert Loube, Ph. D., on behalf of the Office of Public Advocate, Dkt No. 2005-155 (Maine Pub. Util. Comm'n Sept. 26, 2005).

[38] *Separations Order*, ¶¶ 14, 22.

[39] *Id.* ¶ 23 (emphasis added).

office equipment (COE) and [cable and wire facilities (C&WF)] investment will be allocated to the categories and, where appropriate, subcategories for the given year based on the frozen category relationships."[40] The Commission therefore should reaffirm that state regulators may not compel LECs to reallocate categories of investment from the intrastate to the interstate jurisdiction while the freeze remains in effect.

* * *

The Commission should initiate an NPRM to refresh the record on separations, particularly in light of the rapid changes in technology and the competitive marketplace that have occurred since the freeze was originally adopted in 2001. It should request comments from the public, as well as consult with the Joint Board, regarding the process and policy for long-term separations reform. While the Commission should act as expeditiously as possible, it also should extend the separations freeze on an interim basis pending resolution of the proceeding. The interim freeze should be announced in conjunction with the NPRM, so the industry has certainty, and does not have to engage in costly and unnecessary studies before any final rules are put in place. Doing so would advance the public interest and is consistent with the Commission's obligations under the APA and the Communications Act. The NPRM also should confirm that states cannot require LECs to reallocate categories of investment from the intrastate to the interstate jurisdiction during the pendency of the freeze.

[40] *Joint Board Recommended Decision*, ¶ 19.